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ABSQUE HOC

We acknowledge our indebtedness to Sir Frederick Pollock's "Maine's Ancient Law," for the suggestion of a title recollective of one of the most ancient and useful of the bygone fictions of common law procedural pleading.

The generation of British barristers, whose trained timidity justified a gesture so characteristic of the cautious argument by indirection through which the advocate formerly accomplished access to the Court's ear, left us as an historical heritage the absque hoc plea. If one were seeking material for a monument to commemorate the tradition that truth is stranger than fiction, one might pause to contemplate this chameleon of casuistry which carried both truth and fiction to many a correct conclusion.

The plea perished with the passing of the procedure that produced it. Developed by necessity, its creation and application exemplify the work of adepts whose art consisted in gaining the judicial ear without awakening that dormant delirium of annihilative rules living like figurative wasps within the area enclosed by the judicial wig.

Today the plea obtains attention chiefly in connection with the interpretative understanding of the mechanics of the decision law of its day. Historically its study is useful as a mirror to reflect the processes of the judicial mind as it has come to perceive the subordinate relation of rules to Law and to understand the necessity for allowing the Law of

Function. Authoratatively Interpreting the Law for litigants that have suspended action, because of inability to understand the Law, and ask explanation of the question of Law involved. in order that the resolution of the Law may permit litigants involved in acting to evolute the act free from revolutionary action, is the function of courts. Acquiescence literally clears Law a path straight constitutionally for government according to the law by the functioning rule: Legislative, executive, and judicial government can continue to exist together. As Horace Greeley once remarked, "The way to resume specie payment is to resume."

"Absque hoc, is so charmingly reminiscent of the artificial philosophy and practice intimate with formalistic materialism and the doctrine that insisted that promises be made evident for the sight of evidence, that it has seemed to us to offer a most fortunate catalytic with which to precipitate a discussion of an existent legal problem containing elements of considerable and diverse perplexity.

When the courts recognized that a pleader could admit that, technically, the case stood against him, absque hoc, that he meant what he said, but would explain what he meant, the law took a long step toward the preference of principles of Law to rules of procedure—from a frozen system of dead rules to a flexible system ruled by principles responsive to reason. Law existed before laws. Forms may fortify, decisions may designate, and institutions may preserve Law, but none of these can confer a creative substitute for its own origin.

Lest the tolerant reader accuse us of promoting that insidious form of persuasive maintainence so often practiced by advertisers, of collecting attention upon one point in order to feature a focus upon a totally different topic, let us admit that this article is a plea in the nature of a criticism of a current condition of uncertainty conceived to need correction absque hoc (without this) that it intends to criticize either those individuals or institutions circumstantially involved as participants in the situation of uncertainty. Pri-

marily this is a plea in justification of an investigative examination of a principle of applied legal education as it bears relation to the existing law of Pennsylvania, absque hoc that it is intended as a corrective criticism of that law.

We offer this exposition under the title of the absque hoc plea because it is a sign significant alike of the spiritual and sumptuary life of the ancient law in the shadow of which, bench and bar may together for free discussion of the living learning in an atmosphere calm in the contemplation of the memorable past.

With this preliminary apology for the theftuous inspirational use of a learned author's work, caution for the success of our purpose and due regard for the usages of courtesy, compel us to include in preface to subsequent remarks a request, dictated by an appreciation of the inherent sensitiveness of an erudite bench and bar, that the subsequent statements be accepted as expository and not interpreted as argumentative attack.

A distinguished educator, Nicholas Murray Butler, articulating the genetic constitutional concept of our political existence, as amplified in the Constitution of Massachusetts, has said, "Ours is a government of laws, not of men." Upon the truth of this thesis the success of our advocacy depends.

But it is one of the deplorable facts illustrative of the incoherence of communication in the world of organized human thought as it impinges upon the functions of society, that criticism consciously becomes separated from the principles which it proclaims, and seems singularly to associate to itself some certain persons. In this unhallowed comradiere of the individual person or institution and the theory, policy, or decision per se, lies the danger of the destruction or disintegration of every principle of the social state since the conduct, characteristics or caprice of the proponent becomes too often the determinant of the proposition. It is only the balance of sturdy understanding that maintains the genuine distinction that separates the virility

of Smith vs. Brown, from the vitiated amorphous aphorisms of Bolshevistic sophistry.

It is the recognition of this foundation fact of human fallibility that leads us to plead absque hoc to attack the existing organic institutions of Pennsylvania.

There is no disparagment of Dr. Butler's statement in the reflection that his definition is a subjective expression of the political theory of law and does not purport to outline the objective operation of that policy in the living juridical organism by which the effective mechanism of our social state is maintained. Our concern is directly with this mechanism, with the formal institutions which impell it, and most particularly with the administrative units which in high degree direct and determine its immediate applications. More particularly, we are confining our inquiry to the domain of non-political law as distinguished from constitutional law, if we may be allowed this divisional demarcation. By thus narrowing our inquiry we may broaden our investigation and present to the bar the outline of a problem of definite dimension which might otherwise without analysis remain an imperfect complaint.

Specifically, we seek to determine the function of a school of law. Parenthetically, we desire to present for consideration by the bench and bar of the state an individual conception of an aspect of the objective purpose of a law school. Practically, we wish to compel the formulation of a code of conduct capable of definite presentation in the subjective side of the actual functioning of a system of legal instruction as limited to the study of non-constitutional law.

That any genuine solution of the investigation here suggested must engage the labor of teachers, practitioners and judiciary is obvious if existence of the problem be admitted to possess the merit that its enunciation implies.

We shall attempt to plead the problem under three heads and demonstrate it factually by direct references

where references seem advisable to clarify apparent conclusions or elucidate actual conditions of uncertainty.

Let us begin by the practical inquiry: "What is the law in Pennsylvania?" For vindication that this is not a facetious rhetorical query akin to the antique classic, have you stopped beating your wife yet?, we note the existence of a respected and actively functioning bench and bar and a body of decision law equal in volume and variety to that of any state in the union as evocative of the possibility of positive reply.

Next we seek friendly counsel as how best to convey the substance of the answer to our query to student, practitioner, or judge, or in other language, by what authority or reason shall the law of this commonwealth be recognized and taught? This is a question designed particularly to test the examination of the advocate. It aims not to minimize the necessity of a knowledge of adjective or procedural rules, but rather to test the degree of importance assigned by the bench and bar to substantive law. It is believed that from this angle there will be great agreement, that while circumstances may compel the mastery of rules of practice as an indispensable step in gaining access to the courts, yet neither the combined patience of courts and litigants can contrive to produce a knowledge of the law per se nor supply a substitute for the lack thereof.

If it be thought impertinent of the pleader to opine that much of the widely advertised criticism of the courts in this and in other jurisdictions could be most effectively brought to an early grave by laying a wreath upon the brow of the bar in tribute to the lethal learning of the profession in substantive law, it might be pertinently replied, that the making of law, like other balanced accomplishments of the system of institution, under which we, as a people, live is a threefold process in which the responsibility is pre-determinedly divided while the result is united. Although the public may be puzzled as to the reason for instanced results, surely no student of the existing system can enjoy in-

tellectual immunity from the compelled conclusion that the burden of proof for the absence of Law or the presence of bad law cannot be shifted, even though the duty of going forward may be open to interpretative argument in a given instance.

That these remarks are not a deviation from our inquiry but a reminder toward alacrity, is our explanation for their insertion; for we would not presume to stultify our understanding of the legal ethics, which so ably guide the profession, by attempting to suggest an athletic application of principles which must find their expression in individual conduct. To so do would surely be construed as a most unwarranted intrusion upon the sacred right of mankind to be lazy as well as learned.

Perhaps we would do equity more acceptably, if not equably, at least to the extent of dispelling any personal adoption of our foregoing remarks by those members of the bar who might incline to seek solace from the truth by regarding this as an aspersion, by a quotation from a sagacious utterance of Judge Julius M. Mayer of the Circuit Court for the Southern District of New York: "Lawyers and judges are human beings. They have good days and bad days, pleasant moods and disagreeable moods. There are times when they are at their best and times when they are at their worst."[1] Here is a degree of refreshing frankness remarkable both for its courage and discouragement, and rare, in its avoidance, alike of the why and wherefore of the establishment of decisions, and the intellectually inexcusable error of rationalization that insists upon placing a happy ending or a pleasant conclusion upon every expository reference to lawyers and judges or their joint and several responsibility toward the law.

If it be not unacceptably visionary to conceive our age as affected with the spirit of rennaissance and the legal

[1]The Lawyer and the Judge. Feb., 1922. Columbia Alumni News.

profession as tangent with that spirit, it might not be improper to resurrect these remarks of Judge Cooley:

"That lawyer, however able, who rises in court to discuss great questions with no better or more thoughtful preparation than a great collection of precedents, from which he may read what this judge has said, or what deduction that writer has made, has generally no right to expect that he is rendering assistance to the court, or that he is advancing essentially the cause of his client. Every litigated case has an aspect of its own, and is supposed to present some new combination which renders it doubtful what principle should be applied, or what circumstance should be controlling; and what the court needs is to have the principle pointed out, and the why and how of its applicability explained. Judges may read books and hunt up precedents for themselves; but they have not always the leisure to devote to each case that thought and reflection which counsel is employed to give, and which may be essential to insure its being grounded upon the proper basis. This is the duty of counsel,

Any answer to the query, by what authority is the law to be apprehended, would seem to suggest the dilemna: "Is the law to be taught as a cluster of principls illustrated by decisions, assuming the existence of either the common or statutory law; or is the law to be taught as a sequent series of decisions to be illuminated by reference to principles?"

If it be objected that this query presumes to predicate an apparent parallax that does not fairly catch the situation, since it is factually responsible to neither answer as demanded, are we therefore to be compelled to the conclusion that the law cannot be taught but must only and always be studied?

If this be sophistry, then what is a bar-examination, and why? Is it a means devised to discover the possession of the power to reason legally as measured by the candidate's response to problems of applied law in particular

stated conditions? Or is it an inquiry into the recollective capacity of a student reacting to particular puzzles arranged from decided cases? Or is it a combination of these two plus the position that the solution must be positive as to both and the conclusion that one man's guess may prove as good as another's?

It will be apparent that this is not a criticism of the bar-examination as such; for an examination is neither a principle nor a decision, but evidently only a series of questions. If it be urged that we have committed the unpardonable atrocity of answering our query by asking another question, we feel justified in replying that we have passed the bar examination and are now in the third phase of our inquiry, namely: "What are the possible consequences of an inadequate answer to the questions, what is the law of Pennsylvania, and upon what basis may it be taught so as to permit the student to approximate a degree of mastery of the law sufficient to insure his equipment to sustain an examination for admittance to the bar?"

We do not wish to be accused of overlooking the subordinate inquiry as to why is a bar examination. But since the answer must necessarily concern the policy and not the principle served by the examination, it properly remains a matter wholly within the influential discretion of the administrative committee of the bar into whose able care and supervision the Supreme Court has placed its conduct as an agency for the advancement of the profession and the service of the state.

Since it is the purpose of these questions to invite a critical discussion of purpose of the bar-examination, it would be indecorous to urge, in answer to these inquiries, our own conclusions. But to content ourselves with withdrawing from the discussion without contributing some comment toward the common counsel under the privilege of our absque hoc would be equally amendable to criticism There is a recognizable difference between the misplaced kick of a mule and the explanatory comments of his persu-

asive driver from the viewpoint of effective permissive criticism.

If it be not unpermissable to remark upon the potential impermanence resident in the existent circumstance of a vagarious lapse in the continuity of our system of non-political law which enables decision and principle to exist apart as evidential of the impotence of each; and as an open invitation to the re-entrance of the abandoned feudalistic philosophy with its rationalistic justification for the adoption of individual as distinguished from general relational law, then it is competent to state that there exists, in this just described situation, a danger of disintegration proportional in dimension to the degree of the divergence between decision law and the existing common law and statutory principles which the former is supposed to exemplify.

That this danger exists as an active fact, we shall attempt to show by subsequent citation of sufficient examples. That its alleviation is made more difficult by the present system of legal administration obtaining in this Commonwealth and in other important commercial jurisdictions where the functions of law and equity jurisdiction have been merged in one court, we may offer for notice. The absence of what might be termed in the light of the history of English law "competitive courts" is a factor of tremendous weight in the perpetuation of decisions free from the possibility of counter criticism or attack by any court whose conclusions command respect equivalent to the court of original utterance.

This defect, if we may be permitted to use such a term for the purpose of comparative argument, is scarcely capable of being correctively offset by the friction of decisions conflicting only in the political sense incidental to their authority within the limits of a particular state. Consequently, where an erroneous statement of the law exists in a glaring instance of intra-state decision, ordinarily, only be corrected through the recurrence of an analagous case and the persuasive expositional advocacy of a competent attorney culminating in the acquiescence in reversal by the court of

last resort; again corroborating Judge Cooley's doctrine or the positiveness of the relation between the attorney and the court. (Supra, note 2).

This factor alone, would, we feel, amply enforce our duty to advance our previous queries concerning the law and the basis of its discovery to knowledge.

But were the danger confined alone to the concurrence of these mechanical erratus dependent upon occasioal exigencies, the correction would be comparatively simple and might properly be considered a matter so wholly within the province of the courts and the counsellors as to require no third party intervention, or comment, since it could readily be obviated by a mutual insistence upon a more intimate acquaintance with the law.

Since, however, the real danger seems to lie in the second phase of this separation of decision and principle, it might with propriety be shown, that where a condition, either of laxity, or uncertainty, or direct pardoxical pronouncement, occurs in the relation of a decision to the Statute or Principal of Law which its publication is made to proclaim, there will develop unless the lesion be healed, a disease of social and political consequences fatal to the life of the organic institution that cannot or will not take sensible precautions to rid itself of a consuming parasitical growth before the parasite paralyzes its adopted parent. For an institution to refuse to function actively to preserve its bodily vigor by refusing to employ the agencies which it possesses for the speedy expulsion of such poisonous decay from its system, is to invite suicide by evincing a fatuous inertia founded upon the conception common to mental invalids who either assume that a system proceeds perfectly by involuntary processes to expel automatically self-produced by-products dangerous to its healthy condition, or are content to delude themselves with the belief that in doing nothing they are accomplishing something. In either case, the result may be both prolonged and painless, but it cannot be called uncertain. We promised sufficient examples.

Aware though we must be, of that principle of evidence correctly set out in the leading cases of Commonwealth v. House, Appellant, 223 Pa. 487 and Stevenson v. Stewart, 11 Pa. 307, that neither in civil nor criminal law is it possible to perform the proof of an accusation of the commission of a specific act by the process of collecting instances of the occurrence of a limited number of other and unrelated acts, yet since we are not assuming to prove a non-existent condition nor prophecy from historical conjecture the certainty of occurrence of a non-existent condition, we may still, quite correctly point out the inherent possibility of the probability of the future duplication in Pennsylvania of a condition existing already in other states, without offending against any rule of proof. If it be admitted that anything is possible, it is fully competent to show that something is possible and having established this admission, to proceed with a discussion of the probability of something. This is not proof, nor need it be even assertion, although it may be suggestion. No man has ever been hung for discussing the probability of a future possibility, although many have died in the attempt to prove the truth of the impossibility of their assertion. But facts exist of themselves so that we may await or avoid the event without uttering the mistake of a personal intrusion in the guise of either mathematician or seer. The extent to which arbitration has succeeded in supplanting decision in New York and New Jersey, in the former by aid of statute, is a matter of common knowledge and concern.

The first instance we desire to discuss is the case of The Act of May 5th, 1911, P. L. 126, entitled: "An Act to make uniform the law of transfer of shares of stock in corporations," and Sections 4, 10, and 22 of said act, against The Colonial Trust Co., Appellant, v. The Central Trust Co.,[3] as subsequently affirmed upon citation without opinion in The Empire National Bank v. The High Grade Oil Refining Co.,[4] impleaded together.

[3]243 Pa. 268.
[4]260 Pa. 261.

Since none of the litigants can possibly become parties to a controversy cognizable by any court in the Commonwealth of Pennsylvania, and are without standing, we beg privilege to misrepresent neither and attempt to explain in the interest of the vindication of the principle of Law involved, the position of each, for the purpose of general justice which ought not, we feel, to leave two principles in disagreement upon the question of which one is the law without an opportunity being afforded to both to settle such a simple query by resort to reason, since they lack the ability to obtain access to a court for exposition. Especially is this to be recognized as a duty to the law, since, in attempting to instruct students in the study of law, it is unfair to ask a student an unanswerable question, since, should he subsequently meet it upon a bar-examination, he might fail in the examination if unable to answer it, or should that event not be presented, and he should thereafter, in practice, meet the same question from a client, he might be unable to advise a client truly, or fail to inform the investigation of a court correctly, either of which circumstances would be equally a wrong to the client, and the latter, a lapse of duty to the court. These possible consequences conclude us in our duty to place the burden of correctly directing the study of this question upon the Law School, which the Commonwealth has chartered and authorized to teach the principles of law, admitted to exist. Since a neglect , wilful or negligent, to discharge this duty, would merit a forfeiture of the Law School's charter, the gravity of the contract obligation imposed upon the Law School needs no amplification beyond its statement.

That the literal test of the proper performance of this obligation should, by the present system of procedure, rest in the caprice of a third party institution, to determine if it will, the subsequent breach of the effort of performance, by holding the power to deciding that the law is not the law, is a circumstance that might be termed intolerable were it not for the fact that the result of such a condition would be ineffectual to change the law. A bar-examination might

quizzically misjudge the law but fortunately, its power to mistake is limited to maintaining a misunderstanding of the law only to the extent of the willingness of those who subject themselves to its test to temporarily acquiesce therein.

This is not a criticism of the bar-examination as an institution, but merely an exposition of its possibilties for misunderstanding, when its preparation is not made part of the participating duty of the representative Law Schools upon which the Commonwealth imposes the obligation of instructing students in the study and understanding of the law. Nor does this overlook the fact that from the standpoint of the practitioner proceeding by decided cases, the law may be undecided or circumstantially uninterpreted by particular decisions upon a specific point. But the subjective distinction between Law and decision has already been pointed at in the citation from Judge Cooley's works.

Let us begin exposition with a syllabus of the facts in the case of the Colonial Trust Co. v. The Central Trust Co.:

A, a certificate for twenty-five shares of stock is delivered to B, a broker, by D, the owner thereto under a blank power of an attorney to sell and assign the same and with instructions to sell the same when the market should reach a certain price. Thereafter B, in order to procure a loan from the X bank, and in violation of his duty to D, delivers the A certificate to the X bank under a contract permitting its absorption for security by the X bank upon the occurrence of the contingency of the amount of B's liquid securities on deposit with the bank falling below the amount of the sum loaned by the X bank to B, and for which X bank holds B's demand promissory note. This is an action in equity by bill and cross-bill, by the Y bank as receiver for B to set aside a sale of the securities sold to and purchased by the X bank claiming to act under contract permitting it to so endow itself with a title to and an indefeasible right to maintain the title to the A certificate of stock among others, and to sell the same subsequently to the acquisition of such title, to an innocent purchaser for

value and retain the proceeds in entirety of their excess over the sum secured by the body of security deposited by B with the X bank.

The Supreme Court, speaking by Brown, J., January 5, 1914, held: "After conceding that the securities having been sold enmasse to the X bank and purchased in entirety by the X bank for the exact amount of the outstanding indebtedness of B, and thereafter sold enmasse by a broker for the X. bank so as to net the bank a profit of $1500 under an alleged contract duly set forth in the following form:

"$1,500.00 Pittsburg, Pa., October 13, 1909.

"On demand after date I promise to pay to the order of myself at the Central Trust Company of Pittsburgh, Fifteen Hundred Dollars, without defalcation, for value received, having deposited herewith as collateral security for the payment of this or any other liability or liabilities of mine to the holders hereof, now due or to become due or may hereafter be contracted, the following property, viz:

"100 Shares Independent Brewing pfd.

"The market value of which is $....., with further right to the holder hereof to call for additional security should there be a decline in the market value, or on failure to respond, this obligation shall be deemed to be due and payable without demand or notice, with full power and authority to the said holder to sell, assign and deliver the whole or any part of said security, any substitute therefor, or any addition thereto, at any Broker's Board, public or private sale, at the option of the holder, on the non-performance of this promise, or of the terms hereof, at any time hereafter, without demand, advertisement or notice, with the right to the holder of becoming the purchaser and absolute owner thereof, free of all claims and trusts.

"After deducting all legal or other costs and expenses of collection, storage, custody, sale and delivery, the residue of the proceeds of any such sale or sales to be applied to the payment of any or all of the liabilities aforesaid, due or to become due said holder, returning the overplus, if any,

to the undersigned; and in case of any deficiency holding me responsible therefor," goes on to say:

"If it be the legal right of the appellee to keep that money no proceeding in equity can give it to another. Legal rights are as safe in chancery as they are in a court of law, and however strong an appeal may be to the conscience of a chancellor for equitable relief, he is powerless to grant it if the one from whom it must come will be deprived of a legal right. Relief in such a case can come only as the conscience of one vested with the legal right may prompt him to bestow it. In the case under consideration the learned chancellor below held, and was compelled to hold, that the Central Trust Company (X bank) is but exercising in holding on to the money claimed by the complainants in the bill and cross bill, and this being so, equity can do nothing for either of them."

Singular speech this, from the court holding the power of equity to follow the Law in the State of Pennsylvania. Surely there is no invidious meaning behind the remarks of Brown, J., when he says that "The learned chancellor below held, and was compelled to hold."

By authority of what principles of the law of equity is a chancellor compelled to hold that an alleged contract illegal in its inception in law, i. e.: legally impossible, because as set out in this opinion and as effectuated by the X bank it amounts to the performance of an agreement by the X bank to enable it to contract with itself, and at the same time, by denying the existence and application to this agreement of the equitable principles which have been induced into the law as defences, establish itself by the form of a phrase, an innocent purchaser for value without notice at its own sale. This is an interesting and far flung though not fine spun theory, but the trouble with it practically is that it does not bear an intimate scrutiny either from the law or in the instant decision of the application of the principle of equity noticed by Justice Brown but not applied.

By every known principle of the law, it is established that a party may not contract with himself. Therefore, if

the contract for security which the X bank here relies upon, is such a contract, it has no standing in law as a contract, and the X bank has no equity to defend to an application by the Y bank and D, for a recognition of the inequitable situation by a decree ordering a restoration to the parties plaintiff of so much at least of the proceeds of the resale of the A certificate by the X bank as remains after satisfying the security which the pledge, or mortgage of the original securities by B was designed to furnish.

Perhaps the situation would be further clarified by the statement that D, intervening with notice to the X bank before its sale of the A certificate to itself, informed the X bank that D was the true owner of the A certificate. Thereafter, the X bank sells under protest by D, the A certificate to itself, claiming to be a pre-determined innocent purchaser for value by virtue of the contract with B as set out in this case.

But, since this contract was either a pledge or a mortgage, and clearly, on account of its being secondary to and security for the amount of the demand note which preceded and formed part of it as a condition precedent, it would seem to follow as a matter of inexorable logic that the X bank held no right to employ its possession of the pledged or mortgaged certificate in any other form than as a reservoir of security, toward that legitimate purpose, possessing all the incidents and implements allowed by the law to security holders to dispose of the security under agreed exigencies, so as to protect the principal amount involved.

But we are unaware of any principle of the law of hypothecation, either of pledge or mortgage of personal property, that permits, either at law or in equity, the deposit of the security to be turned into a contract of purchase and sale, free from the right of inspection inherent in an equity court to examine the agreement and its performance toward the detection of over-reaching, or the device of trying to provide in the same contract for a pledge, mortgage, and conditional sale as might suit the convenient selection of the party secured, for the purpose of turning an agreement

which is and must be and patently can only be a security arrangement, into a scheme for the profit of the party secured.

Regarded as a conditional sale, the X bank's agreement is capable only of interpretation as a contract to compel a conditional sale, which, by the facts of the case and the contract, reduces to a contract by the conditional vendee to sell to itself its own position as conditional vendee in order to constitute itself an innocent purchaser and transferee for value without notice of the title of the A certificate. Is equity powerless here?

By no means. Why? Because, although the previously set forth form of the arrangement between the money-lending X bank and the money-borrowing broker B, amounts in actuality to a concession by B to permit the X bank to do something that the Law and the rules of Equity say it will not be allowed to do, namely, deprive B of his rights to have a fair valuation placed upon his own security subject to the judgment of a competent court of this Commonwealth sitting in Equity, and is to this extent inherently defective so far as its operative effect to invest the X bank with any automatically perfectable title is concerned, the aforesaid arrangement is more helplessly, hopelessly, and inexcusably stupid still, because it in fact, is an attempt to accomplish a barter or exchange of B's A certificate for the X bank's money by the process of an agreement, which, as any competent counsel knows, is impossible at law, unenforcible in equity, and in fact amounts to a suspension of barter or exchange, so that the X bank in this case cannot even claim to have obtained anything more than an imperfect common law pledgee's lien in the A certificate, imperfect, because, with notice from the true owner, D, the X bank cannot at common law, sell the pledged certificate, nor successfully defraud against a possessory action by D, the true owner thereof. Hence B can neither deprive himself of his law-declared right, to be protected in his own property from an over-reaching security conversion, nor defeat D's title to the A certificate by an imperfect pledge of the stock.

Because of the incomprehensible stupidity of the counsel who drafted the agreement to barter by which the X bank, was informed that it might be both a broker to sell a promise by B to itself and a discounting bank to buy its own contract with its own money in order to acquire an indefeasible title to the A certificate, the property of D, through the device of a statement in writing by B that it (X bank) might perform this miracle, the X bank was inveigled into believing that by this labyrinthine arrangement of ubiquitous phrases it could lull the Law of the Commonwealth of Pennsylvania into peaceful slumber by the mere placing of B's signature at the end of this carefully prepared statement that there is no longer either law or equity in Pennsylvania for D; if the X bank says so and B signs his name to this miraculous pronouncement. With the assistance of counsel to persuade the court to agreement with the legality of this agreement, the miracle became a decision. But it is the business of a School of Law to distinguish between the Law and decisions, and to point out that miracles are at variance with Law. Like those of our American ancestors whose genius conceived the expression of the law which had not been forgotten in Daniel Webster's day, it is our duty in schools of law, to study the Law, in order that the Law may be made plain and understood. Unless we do this, we may lack counsellors and further add to the burden of the uncomplaining and overworked courts.

Regarded as a pledge, the X bank, having received notice before sale of the pledged certificate from D, the true owner thereof, cannot claim to hold the proceeds of such sale beyond the amount of its pledgee's interest, nor can it, so limited, sell the pledge to itself as an innocent transferee for value without notice, upon a known theory of security law, since the principle that protects an innocent pledgee for value (which the X bank here was), in the right to enforce this position as an actuality and liquidate the security, does not extend to buying the security for the sum secured and constituting itself by this functious declaration, the possessor of what was once a certain exchangeable in-

terest and by this legerdemain, has become a certain salable title, since this is a conversion of equitable into legal title which overlooks the fact, that the law of security does not recognize the rule that in protecting something, it will enable the party protected to get something, i. e., the legal title, for nothing. The law of security is founded upon the principle of the preservation of value, and agreement which aims to undo this principle and by providing a protection of value as between the parties so as to prevent loss, while at the same time using this agreement as the basis of a converse agreement that provides against loss by one of the parties by a contract determining the pre-purchase of the security by this one party and the destruction of equities created by the primary contract so as to invert the relation to the form of a common law mortgage destroying the pledge and permitting the pledgee to acquire the entire title and constitute itself a common law mortgagee holding free of even the necessity of foreclose, is to admit, that all previous rules erected by equity to prevent a mortgagee from creating itself an innocent transferee for value free of all equities arising from the mortgage reation, are hereby recognized as overthrown. In brief then, if we have to believe Justice Brown, equity admits, in Pennsylvania, that it is without ability to control the law of contracts, or the common law, from permitting two parties to agree that one of the two may by contract, become the absolute transferee of both the legal and equitable title of the other in a certain res, or chose in action free from any legally or equitably enforceable duty to perform the primary or original legal obligation treat the title transferred as a security and not as a sale, or, treating the transfer of complete title as a sale, confess an inability to prevent the party who claims to have become a vendee in possession with title, predicated upon a contract to sell, from establishing the curious anomaly of legal contractual impossibility of creating a perfect vendee's title to a res by asserting that he has discovered and demonstrated that there is no difference between a contract to sell and a sale.

You can contract a disease but not a sale.

While it is possible that the X bank truly believed that this distinction does not exist in Pennsylvania, or, if it did exist, is a distinction without a difference and hence does not exist or better still, that if it did exist, it ought not to continue to exist, and while it is apparent that by its decision, the Supreme Court, was moved to acquiesce in the misunderstanding of the law by the X bank, yet we are unable to conceive that the law, which exists organically has been changed by this decision.

While it may be true in Pennsylvania, as asserted by Justice Brown, that: "What was done by the appellee (the X bank) in selling them (including the A certificate) was lawfully done, (if "lawfully done" means decided lawfully) and the title which it (X bank) acquired was an absolute one"; yet his assertion that, "On this unanswerable legal proposition it (X bank) has a right to stand when alleged equities are asserted against it", can only receive the agreement of the bar upon the interpretation that by "unanswerable," the court meant in the instant case, "unanswered" and intended this statement from Justice Brown to be a rebuke to counsel for neglecting their duty as conceived by the Supreme Court and the late Judge Cooley, to correctly inform the Court upon the proper principle of law. The serious reflection upon the conduct of counsel and the ability of the bar contained in this rebuke from our highest Appellate Court, merits liberal reflection upon the duty of law schools to teach the principles of existing substantive law.

That the law is as has been herein explained, is evident from the most cursory examination of the Sales Act or the most elementary acquaintance with the principles of law which preceded its enactment.

The commentators in issuing the Sales Act, appended to Section 1, the statement that: "The most fundamental distinction in the law of sales is between a contract to sell in the future and a present sale."

Paragraph 3, of Section I of the Sales Act reads: "A

contract to sell or a sale may be absolute or conditional." The law states the permissive distinction disjunctively, implying the informative statement that 'The law cannot conceive nor recognize such an amphorous article as a contract absolute and conditional to sell a sale; or a sale absolute and conditional to contract to sell.' While the result of these interesting suggestive impossibilities might conceivably exist in the objective situation of someone of the parties to scheme having been "sold", it is scarcely conceivable that equity can deny itself power to dispell in a clear instance, that inequitable aphorism of the philosophers, that the law doth not protect a fool, for to take such a position would be to tacitly admit that the circumstance of a party having been fooled might be made to make the law seem foolish, which is an inconceivable impertinence equivalent to the popular idea afloat in certain parts, that private arbitration can usefully supplant resort to the courts. It might be here added, that when counsel become converted to arbitration, they may be assured of finding themselves without courts. And what is a lawyer without a court but an admission that there is no longer existent in these United States judicial, and executive functions?

Paragraph 4 of Section I of the Sales Act reads:

"There may be a contract to sell or a sale one part owner and another."

We submit that the impossibility of a desired identity of contract to sell and sale gains no additional impetus from the circumstance that the law recognizes the ability of two or more parties to sell or contract to sell partively owned properties or partitive rights in a certain res.

That the Sales Act does not include a pledge or a mortgage of a chose in action may be gathered from the definition of "Goods" in Section 76 which reads: "Goods" include all chattels personal other than things in action and money.

Hence it is apparent, that not only was the agreement of the X bank illegal under the Sales Act, but actually impossible as a contract, being plainly: An attempt to turn a pledge of a certificate of stock into a mortgage of that

certificate of stock, and then by an agreement absolute and conditional to contract to sell a sale of that certificate of stock to the X bank, the original pledgee, which was by this device to constitute itself an innocent purchaser for value of the A certificate, converted and pledged by B to the X bank, under the above detailed patent process whereby the X bank, having by this hocus pocus contrived to create for itself the semblance of an innocent transferee for value by the simple expedient of agreeing with itself to pay no attention to notice from D, the real owner of the A certificate upon the principle that it (X bank) had contracted with itself with anticipatory acumen against the possibility of ever being troubled by law or equity with the annoying fact that there could exist a real owner of the A certificate, other than the X bank, unless the X bank chose to sell or give away its victorious title to D's property of its own free will; and having also contracted with itself absolutely and conditionally to have sold itself the A certificate of stock under its absolute and conditional agreement with itself, it could sell itself the sale of that certificate and then sell the A certificate which it could not by this mistake have bought, and keep the proceeds of the conversion, freed from even equitable duty to account for the difference between the amount for which it originally held the pledge as security and proved value of the stock as sold at a broker's board same day.

"Relief (for D) in such a case can come only as the conscience of the one vested with the legal right may prompt him to bestow it," says Justice Brown.

There is no record that the relief came in the case of the Colonial Trust Co., Appellant v. the Central Trust Co. Whether this be due to the fact that a corporation is not endowed with a conscience, or that possessing a conscience it agrees with itself and the decision, to the effect that, if equity does not follow the law in Pennsylvania, it is hardly the business of a banking institution to refuse to follow what equity allows to be the law, is immaterial to the real question, namely: under the circumstance that this case,

decided in 1914, not arising under the Act of May 5, 1911, and the subsequent re-affirmation citation without opinion in a Per Curiam affirmation of the opinion of Evans, J., in the case of the Empire National Bank v. the High Grade Oil Refining Co., what is the law to be taught, studied, or followed in Pennsylvania today, under the Uniform Stock Transfer Act? Does the Stock Transfer Act change the rule as laid down in the case under discussion?

It is believed that neither Section 10 nor Section 4 of the Stock Transfer Act would alter our previous explanation, that neither in the guise of pledgee, or mortgagee, could the X bank properly claim to hold the surplus realized by the sale of the A certificate of stock, for more than the amount of the pledge.

Disregarding Section 10 of the Stock Transfer Act as inapplicable to a comparison of the decision in the principal case since the argument and decision each treated the X bank as having acquired full title as an innocent transferee for value without notice or under obligation to respond to subsequent notice after title is perfected, let us fit the facts to Section 4 of the Act as defined in its terminology by Section 22.

Section 4: The title ("Title" means legal title and does not include a merely equitable or beneficial ownership or interest) of a transferee (Transfer means transfer of legal title) of a certificate under a power of attorney or assignment not written upon the face of the certificate, and the title of any person claiming under such transferee, shall cease and determine if, at any time prior to the surrender of the certificate to the corporation issuing it, another person, for value in good faith, and without notice of the prior transfer, shall purchase and obtain delivery of such certificate with the indorsement of the person appearing by the certificate to be the owner thereof, or shall purchase and obtain delivery of such certificate and the written assignment or power of attorney of such person, though contained in a separate document."

"To purchase" includes to take as mortgagee or as pledgee."

"Purchaser" includes mortgagee and pledgee."

"Value" is any consideration sufficient to support a simple contract. An antecedent or pre-existing obligation, whether for money or not, constitutes value where a certificate is taken either in satisfaction thereof or as security therefor.

It is submitted that the extent of this enactment is to protect a bona fide purchaser or purchasers "in good faith" for value absolutely, to the entire extent of that title which he purchases, so that a legal title or an equitable title shall as a pledge or mortgage interest is protected as such, to the extent of its character, but no further. But it is from this self evident fact submitted further, that, Section 4, nor any other section of the Transfer Act, provides for any such device as the machinery used to attempt to acquire the position of pledgee, mortgagee, conditional vendee and purchaser-transferee and therefor, so far as the Act is helpful. we can find no support for the authority at law of the decision in the principal case, either in the known principles of the common law, the Sales Act, the Stock Transfer Act, or in equity.

It would seem therefore, that as a matter of the reasoned explanation of two principles in apparent conflict, that the decision, and its affirmed citation in 1918, must give way to Act of May 5, 1911, P. L. 126, Sections 4, 10, and 22 of the same. We urge this view as obvious and are encouraged to state this position as a consequence of a study of the larger question raised in the third phase of our Absque Hoc plea, namely, what might be the outcome of an inability to know what is the law of Pennsylvania and how it should be taught and studied, and are moved to quote in justification of our remarks these remarks from the opinion of Mr. Justice Kephart in Fuher, Appellant, v. the Westmoreland Coal Co., 272 Pa. 14 at 17, which might well be taken to apply to a decision against the Right of the Law:

"If the jury's verdict is against the weight of the evidence, a new trial should be granted, and, when manifestly so, as often as the court, in all conscience, should deem it necessary. Under our jurisprudence, this is the only corrective remedy for a perverse verdict.

"Exceptions to this rule have been made in cases where testimony stands opposed to physical facts admitted or the evidence thereto is of such conclusive and unimpeachable nature as to amount to an admission. While an appellate court may not be authorized to weigh evidence and pass upon disputed facts, it should use its judicial knowledge to bring about justice, and, where undisputed physical facts are clearly shown and it is demonstrated by the law of nature by mathematics or the like that a finding is untrue and cannot be true, the appellate court is justified in reversing the trial court.....Appellee urges the evidence before us presents such situation."

In conclusion, we wish to urge that we have been moved in this exposition by no motives of personal criticism. Particularly do we desire to be understood as defending our courts against demagogic attack and unfair and uniformed criticism. More especially do we aim to urge upon the attention of the bar, that without the employment of greater and growing assistance in the discussion and application of existing law, the courts of highest jurisdiction will be cluttered with cases and unable of their own volition to reconsider according to rules of manifest justice a decision once uttered. It might be observed in passing, that with the multiplication of cases of applied principle, students of the law look to the growing importance and divergence between the solicitor and the advocate for the work in the courts, and primarily toward maintaining the responsibility where it largely belongs, upon the counsel and not upon the existence of particular cases of decision which counsel have contrived to obtain from the Courts of the Commonwealth, contra to the Law.

If the result of our exposition of our position under absque hoc is to arouse "an invincible bias" as a leading ex-

positor of the law of the Commonwealth has styled it, we shall indeed experience a disappointment, the more keen by resort to contemplation of their thesis of our advocacy, that "Ours is a Government of Laws, not of men." An observation which it would seem is singularly incapable of compressable understanding to a certain Mr. Norman Hapgood who confesses his mental travail to American Labor and is leaving for Europe to seek the fight.

JAMES BRODERICK GIBSON,
Carlisle, Pa.

MOOT COURT

SIDDONS v. X COMPANY

Workmen's Compensation Law—Injury in Course of Employment—Interval for Rest—Constitutional Law—Pennsylvania Constitution, Article 1, Section 9—Workmen's Compensation Act of June 2, 1915, P. L. 736—Validity

STATEMENT OF FACTS

Siddons, employed by defendant to carry heavy castings from one part of the foundry to another, had an interval of fifteen minutes for rest. While sitting down, a fellow playfully struck him and he was knocked over, and falling against a pile of iron, was killed. His widow is allowed compensation by the Workmen's Compensation Board. Its award is sustained by the Common Pleas Court. An appeal alleges that it is unconstitutional to make defendant liable for a result not arising out of Siddon's work, and that the case does not come within the provisions of the Act of June 2, 1915, P. L. 736.

Henderson, for the Plaintiff.
Fehr, for the Defendant.

OPINION OF THE COURT

KLEPSER, J. The appellant contends that Section 201 of the Workman's Compensation Act of June 2, 1915 P. L. 736 is unconstitutional. This section provides, "That in any action brought to recover damages for personal injury to an employee in the course of his employment or from death resulting from such injury, it shall not be a defense, (a) that the injury was caused in whole or in part by the negligence of a fellow employee; (b) that the employee had assumed a risk of the injury; (c) that the injury was caused in any degree by the negligence of such employee, unless it be established that the injury was caused by such employee's intoxication or reckless indifference to danger. The burden of proving such shall be upon the defendant, and the question shall be one of fact to be determined by the jury. It is alleged that this is in violation of Art. 1 Sec. 9, of the constitution of Pennsylvania, which provides that: "A person cannot be deprived of his life, liberty or property unless by the judgment of his peers or the law of the land." It is contended that the taking away of the above enumerated common law

defenses is taking away property without due process of the law. We cannot agree with this contention.

We find the following in Anderson v. Carnegie Steel Co., 255 Pa. 33, in the opinion by Mr. Justice Brown. "It is urged that the taking away of these defenses, (Sec. 201 above) is deprivation of property without due process of law. Employers may no longer set up certain defenses available under the Common Law; but no one has property in any rule of that law. Rights of property may be acquired under it and when so acquired, the owner is not to be deprived of them, "unless by the judgment of his peers or the law of the land," but while rights of property created by the unwritten law cannot be taken away without due process of the law, the Common Law itself may be changed by statute and from the time it is so changed it operates in the future only as changed." The learned Justice cites in his opinion the case of Mondou v. R. R., 223 U. S. 1. That case held "A person has no property, no vested interest in any rule of the common law. Indeed the great office of statutes is to remedy defects in the Common Law as they are developed, and to adapt it to the changes of time and circumstances."

In State v. Claussen, 65 Washington 156, the court said in connection with this point, "If therefore an act in controversy has a reasonable relation to the public health, morals, safety, or welfare, it is not to be set aside because it may incidently deprive some person of his property, without fault, or take the property of one person to pay the obligations of another—it is so conceded by all modern statesmen, jurists and economic writers who have voiced their opinions on the subject, and the principle has been enacted into law by nearly all the civilized countries of Europe, Australia and Canada. The Workmen's Compensation Act therefore, having in its support these economic and moral consideratum is not unconstitutional.

Deibeikis v. Link Belt Company, 26 Ill. 454, held, "Under the conditions of Section 1, an employer is deprived of the Common Law defenses of assumed risk, contributory negligence, and that the injury or death was caused in whole or in part by the negligence of a fellow servant. To deprive an employer under such circumstances of the right to assert those defenses is not an exercise of the police power, but is merely a declaration by the legislature of the public policy of the state in that regard. The right of the legislature to abolish these defenses cannot be seriously questioned."

Having disposed of the constitutionality of the subject we have only to decide whether Siddon's injury arose "in course of employment." The Act in Sec. 201 provides a remedy for all injuries or deaths occurring in the course of employment with exceptions noted in sub-section c. The X Company allowed Siddon fifteen minutes

to rest. This rest was calculated to enhance the efficiency of Siddons, whose duties were strenuous. This interval of rest did not constitute a break in the course of employment. Dziskowski v. Superior Steel Co., 259 Pa. 578.

"It cannot be said that employment is broken by mere intervals of leisure—especially where the accident takes place on the premises of the employer. Acts of ministration by the servant to himself, the performance of which while at work, are necessary for his health and comfort, are incidents of his employment and within the meaning of the act, although they are only indirectly conductive to the purpose of his employment. No break is caused in the employment by leaving work to seek shelter, warm oneself, or to rest." 1 Honnold, on the Workmen's Compensation Act.

We hold that Siddon's death happened during the course of his employment.

OPINION OF SUPREME COURT

Under the Act of June 3d, 1915, P. L. 736, liability of the master for injuries to the workman, does not depend on their having arisen "out of" his employment. It is enough that they have arisen "in the course of" his employment. Dzikowska v. Superior Steel Co., 259 Pa. 578.

The interval of 15 minutes for rest, to be spent on the premises, did not interrupt the "course" of his employment. Ibid.

The injury may have arisen from the negligence of a fellow-workman, though that it did so arise is not certain. The Act of 1915 provides that the causation of injury by the negligence of a fellow workman, shall be no obstacle to the recovery of compensation from the employer. Nor should it ever have been. The importance of the human mind, like that of other agents, machines, etc., is one of the risks of business, and the business should afford compensation to those who suffer hurt, from this imperfection as well as from other kinds.

What needs apology is, not the abolition of the fellow-servants rule, but its establishment and adherence to it, for so long a time. The learned court below has properly refused to find an obstacle to the repudiation of the former rule, in the Constitution of the State or of the United States. Its judgment is

AFFIRMED.